

In the Supreme Court of the Hawaiian Islands.

In Banco.

JANUARY TERM, 1891.

J. KILA vs. P. KANTUT.

BEFORE JUDG. C. E. MCULLY, BUCKERTON AND DOLE, J. J.

OPINION OF THE COURT BY DOLE, J.

This action was brought in the District Court of Koolanpoko, Oahu, to recover damages laid at \$250.00 for the illegal sale of the defendant, as the pound keeper of the said district, in June last, in selling two horses of the plaintiff while in the pound, not taking proper care of them, improperly increasing the expenses on them and making unjust charges against the plaintiff, in contravention of the law and the rights of the plaintiff.

The horses sold for \$101. Their value by the testimony was \$190. The District Justice found this latter sum in favor of the plaintiff. The defendant appealed to a Justice of this Court at Chambers, and the case was tried on the facts by Mr. Justice Dole, who found the sale was illegal as the pound master (defendant) did not post the statutory notices until three days after the impounding, and gave judgment for the amount the horses were sold for, not allowing pound fees or charges.

The defendant now brings his exceptions, alleging error in that:

(1) "The complaint cannot contain a claim for the price of the horses and damages for illegal sale."

(2) "There is no evidence on the part of the plaintiff and it is not proved that the sale was illegal."

Upon the first point the law is clear, that if the pound keeper has not followed the statute in all the acts required of him up to and including the sale, the owner of a legally impounded animal illegally sold can recover its full value of the pound keeper without allowance of pound fees and expenses.

In the case before us the complaint is not skillfully drawn, but it seems to us to cover sufficiently the claim for damages for an illegal sale, although there are allegations of insufficient care of the animals and improper charges. These may be treated as surplusage. The Justice to whose judgment exception is taken, was of opinion, as above indicated, that the sale was illegal, in that as the statute required the notices to be posted "as soon as possible after the impounding," to post them the third day after the impounding was not a compliance with the law.

The decisive question in this case is whether the defendant's delay of three days before posting the notices required by law to be posted "as soon as possible after the impounding" was within the statute. The notice referred to in the statute shall contain a full description of the estray with an announcement of the day on which it will be sold at public auction, if unclaimed, and must be posted "at the post office (if there be one in the district) and not less than two other public places" in the district; and this must be done "as soon as possible after the impounding."

We adopt the construction of the words "as soon as possible," on the authority of *Hydraulic Eng. Co. vs. McHaffie*, 4 Q. B. Div. 678: "to do a thing as soon as possible means to do it within a reasonable time, with an undertaking to do it within the shortest practicable time." Winsfield in his *Adjudged Words and Phrases*, defines "reasonable time" to mean "as soon as circumstances permit," (p. 519).

The defendant testified that "after three days the notices were put out." He does not say that it took him three days to post them, but "after three days they were put out." He gives no reason for the delay. So far as the Court is informed, he made no move and took no action whatever toward carrying out this statutory requirement until three days had elapsed, and then he woke up to the call of duty and proceeded to put out the notices. Was this "the shortest practicable time," or was it "as soon as circumstances permitted," the authoritative definitions of the statutory words "as soon as possible?" Clearly it was not.

The defendant stated that "notices were placed in prominent places, one at the bottom of pali, one at Chinese store, one at Hevia." There is no evidence as to the locality of the Chinese store, but as to Hevia and the foot of the pali, the distance between them by the road is no obstacle to a man living at Hevia, which is defendant's place of residence, to posting notices in both places in one day or in one forenoon for that matter, even if he had to go about, which is not likely with a Hawaiian; and if the "Chinese store" was between these localities, as is probable from the fact that in giving his testimony defendant placed it between them in the sequence of his narrative, then no good reason can be easily imagined for putting off till the fourth day this important work.

In a case like this a delay of three days before acting, puts on the party complained of the necessity of introducing testimony that such delay was reasonable, i.e., as soon as circumstances permitted, or "within the shortest practicable time," failing to do this the Court has nothing before it to show that a delay which is prima facie unreasonable, is on

account of some circumstances or other, reasonable and necessary.

In *Commonwealth vs. Boston* (16 Pick. 448), the city was indicted for not putting in order a new public road in South Boston authorized by statute; the Court held that the city having decided that the work of completing this road and making it passable as a street should be taken up, they were bound to complete it within a reasonable time of such conclusion; and as to reasonable time, the Court said, "if the city had intended to defend on the ground that they had proceeded and were proceeding with reasonable diligence, to make and complete this highway, and that they had not had reasonable time after passing the order to complete it, they should have set forth the facts necessary to maintain such defense that the Court might judge of them."

The statute under which a pound master is authorized to sell estrays, must be construed strictly against him. The owner of the estrays is entitled to have the law strictly carried out. The law requires that estrays that are not claimed shall be sold at auction at noon on the first Saturday ensuing after the expiration of twelve days from the time of impounding. A delay of three days, therefore, in posting the notices materially diminishes the owner's chances of being informed of the impounding of his animals and that they are liable to be sold to the highest bidder; he is entitled to have the notices made according to law, that is, "as soon as possible," i.e., "within the shortest practicable time," i.e., "as soon as circumstances permit," after the impounding, for he or his friend may, passing along the road, on the second or third day, be in a position to see the notice that ought to be there, and miss seeing them, because of an unwarrantable delay in posting them and so be injured in his property.

We are satisfied that a delay of three days is not in accordance with the statute unless good reasons be shown for such delay, which has not been done in this case.

"It is incumbent on the defendant to show that all his proceedings have been in entire conformity with the provisions of these statutes, and any failures in this respect being an abuse of authority given him by law, will make him a trespasser *ab initio*."

Smith vs. Gates, 21 Pick. 56; *Merrick vs. Work*, 10 Allen, 544; *Sherman vs. Brauman*, 18 Met. 497. We are therefore of the opinion that the sale was illegal and that the plaintiff is entitled to the full value of his horses at the time of sale without offset for pound fees.

Exceptions overruled.

W. R. Castle for plaintiff; J. L. Kaulukou and J. A. Magoon for defendant.

Honolulu, April 17, 1891.

Supreme Court of the Hawaiian Islands.

In Banco.

SPECIAL TERM, MARCH 30, 1891.

JOSIAH SHAW vs. AH LING, PELANI (w) AND KAOPILOA (s).

On appeal from the Commissioners of Private Ways and Water Rights of the District of Honolulu.

JUDG. C. E. MCULLY, BUCKERTON AND DOLE, J. J.

The petitioner not showing a right of way by prescription, a right of way by necessity awarded him.

OPINION OF THE COURT PER JUDG. C. E.

The Commissioner awarded to petitioner a right of way three feet wide over the land of Pelani (w) at Kalaepohaku, Kapalama, Honolulu, Oahu.

It was located by the Commissioner to begin "at the north corner of Pelani's land (sold by R. Keelikouani to Kahuana by deed recorded in Liber 32, p. 412) at stone wall and runs along the northwest boundary of Kahuana, to L. C. Award 2266, thence across a portion of this award to and across an auwai." The defendants appealed. It appears from the testimony that this lot called Kahuana was unfenced for many years previous to the sale to Kahuana, and that the persons occupying the land makai of it, now owned by Mr. Shaw, had access to the Government road through every part of the Kahuana lot as it suited their convenience. On the sale to Kahuana in 1875 it was fenced and built upon and afterwards divided to Kahuana's heirs, one of whom is Pelani (w), defendant. Mr. Shaw's predecessors in the title, and his tenants since his purchase of the land below in 1886, were accustomed to pass through a gate in Pelani's fence on the Government road, over her land to a gate in a fence which separated the house lot from her cultivated land below leased to Ah Ling, defendant, and along a kuauna or bank to Mr. Shaw's land. This last mentioned gate was closed by Ah Ling, defendant, and caused this application.

It is clear that the right of way claimed by the petitioner, Mr. Shaw, has not been acquired by prescription, for its use only began in 1875, when the fences were put up.

We think, however, that Mr. Shaw is entitled to a right of way to his land from the Government road makai which leads to the stone quarry and out to King street on the

easterly side of Kamehameha school premises. He is entitled to it by necessity. But the Commissioner has located it very inconveniently for Pelani (w). It would cut through the back part of a stable that has been apparently standing for many years. We noticed on our visit to the *locus in quo* that Mr. Shaw has land adjoining the Pelani lot extending to the Government road. Why should not the right of way be awarded to petitioner over his own land as far as it extends? The statute requires that the decision shall be "equitable," and we think it would be inequitable to award one a right of way over another's land, causing the removal of buildings, when it can be avoided.

It was stated in argument and admitted by counsel on both sides that this lot is under lease by Mr. Shaw to Ah Ling, one of the defendants. It is cultivated in bananas. The judgment of the Commissioner is reversed, and we award a right of way three feet wide, beginning at the stone wall on the Government road in question, and running on the Shaw land (marked No. 2 on the map filed) along its easterly side, where it adjoins the Pelani lot. The right of way is to run makai at right angles, as near as may be, to the Government road, and to continue on through the Shaw lot marked No. 2, to and through the L-shaped part of the Pelani lot marked "E" on the map over the auwai to the Shaw land marked No. 3 on the map. The right of way is not to be fenced out. The expense of opening the way is to be borne by the petitioner.

Each party to pay his own costs. W. O. Smith for petitioner; S. K. Kane for defendants.

Honolulu, April 15, 1891.

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AT THE ADJOURNED ANNUAL MEETING OF THE WOODLAWN DAIRY & STOCK COMPANY, held this day, the following named officers were elected: R. F. Dillingham, President; A. L. Smith, Vice-President; T. S. Southwick, Treasurer; W. O. Smith, Secretary; W. F. Allen, Auditor. All of whom reside in Honolulu. W. O. SMITH, Secretary. Honolulu, May 15, 1891. 2763-1W 1876-2c

NOTICE.

THE ROAD FROM PAHALA to the VOLCANO HOUSE, known as Peter Lee's Road, is a private road. Any one wishing to travel over the same must pay \$2.50 toll. Forable either at the Volcano House or at the Half-Way House. 1875-1c

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TO THE STOCKHOLDERS OF the Hilo and Hawaii Telephone and Telegraph Co. A dividend of one dollar per share will be payable at the office of the Company on MONDAY, May 19th, 1891. By order of Board of Directors. E. H. RICHARDS, Assignee Hilo and Hawaii Telephone and Telegraph Co. Hilo, Hawaii, April 25th, 1891. 1875-4c

Assignee's Notice.

THE UNDERSIGNED HAVING been appointed Assignee of the estate of Chiu Pui of Honolulu, bankrupt, all persons indebted to said estate are hereby requested to pay the respective amounts owing by them immediately to the undersigned at the office of Ed. Hadschlagger & Co., TH. OPFERGELT, Assignee Chiu Pui estate. Honolulu, May 21, 1891. 1876-4c

Honolulu Library and Reading Room Association.

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Estate of George H. McLain of Nawiliwili, Kauai.

THE UNDERSIGNED HAVING been duly appointed assignee of said bankrupt estate, hereby gives notice to all persons owing the said estate to make immediate payment to E. TODEYN, Assignee. Honolulu, May 21, 1891. 1876-3c

Administrator's Notice.

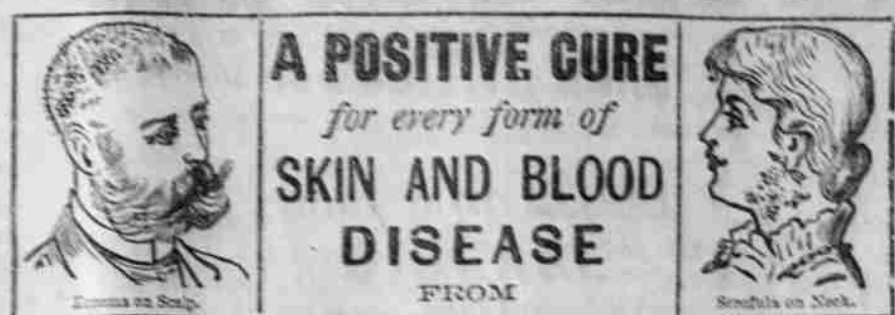
THE UNDERSIGNED TEMPORARY Administrator of the Estate of Lam Young Kim (deceased) of Honolulu, hereby notifies all persons that have any claims against said estate to present same to the undersigned at his office at King Lot's store, on King Street, Honolulu, with proper vouchers therefor immediately, and all persons indebted to said estate to pay their indebtedness to the undersigned immediately. LAM YIP, Temporary Administrator of Estate of Lam Young Kim, deceased. Honolulu, May 21, 1891. 1876-1c

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